United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1180

To be argued by
ROBERT GOLD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1180

UNITED STATES OF AMERICA,
Appellee,

—v.—

RICHARD HUSS and JEFFREY SMILOW,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Richard Huss and Jeffrey Smilow appeal from an order filed April 1, 1975, in the United States District Court for the Southern District of New York by the Honorable Thomas P. Griesa, United States District Judge, denying their motion under Rule 35 of the Federal Rules of Criminal Procedure for a reduction of their sentences of imprisonment for one year, imposed on July 31, 1974, following appellants' conviction after a trial before Judge Griesa and a jury on charges of criminal contempt of court.

Huss and Smilow are presently serving their sentences.

Statement of Facts

A. The Initiation of Criminal Contempt Proceedings Against Huss and Smilow.

This criminal proceeding began on June 27, 1973, when the Honorable Arnold Bauman, United States District Judge, having previously held Huss and Smilow in civil contempt of court, directed the United States Attorney for the Southern District of New York to proceed against Huss and Smilow on the charge of criminal contempt of court for their refusal to obey lawful orders of the Court requiring them to testify under grants of immunity at the trial of *United States* v. *Stuart Cohen and Sheldon Davis*, 72 Cr. 778 (hereinafter "the Hurok trial").* On June 28, 1973 Judge Bauman signed orders requiring Huss and Smilow to show cause, pursuant to Rule 42(b), Fed. R. Crim. P., "why he should not be adjudged in criminal contempt for his wilful refusal to answer questions put to him at the trial of *United States* v. *Stuart Cohen and Sheldon Davis*, 72 Cr. 778, . . ."

B. The Trial of Huss and Smilow for Criminal Contempt.

The trial of Huss and Smilow for criminal contempt of Court began before Judge Griesa and a jury on July 15, 1974, and concluded with the return of guilty verdicts the following day. The Government's proof at trial, consisting solely of portions of the trial transcript of the Hurok trial before Judge Bauman, was as follows.

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* On January 26, 1972 firebombs exploded in the New York City offices of Columbia Artists Management, Inc. and Hurok Concerts, Inc., killing Iris Kones, a secretary. On June 19, 1972, Stuart Cohen, Sheldon Davis and Sheldon Seigel were indicted in the Southern District of New York for the firebombing and charged with violations of 18 U.S.C. §§ 844(i) and 2. A superseding indictment, 72 Cr. 778, filed on July 3, 1972, charged the

[Footnote continued on following page]

The Hurok trial commenced on May 30, 1973, and on the following day Sheldon Seigel was called as the Government's first witness.* Apart from stating his name and address, Seigel refused to answer any of the questions put to him. Persisting in his refusal even after being ordered to answer by the Court, Seigel was held in civil contempt pursuant to 28 U.S.C. § 1826(a).

The next witness called by the Government was appellant Richard Huss, but before any questions were put to him Judge Bauman adjourned the trial for one week to enable the Government to determine whether the Central Intelligence Agency had conducted electronic surveillance of persons involved in the case.

On June 8, 1973, the Government reported that there had been no such electronic surveillance, agreed to vacate the outstanding order of civil contempt against Seigel, recalled him to the stand, granted him immunity and attempted once again to question him about the Hurok fire-

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original three defendants and a fourth, Jerome Zellerkraut, with the original two firebombing counts (18 U.S.C. §§ 844(i) and 2) and, in addition, with conspiracy (18 U.S.C. § 371) and unlawful possession of explosive devices (26 U.S.C. §§ 5845(a)(8) and (f), 5861(d) and 5871).

* On February 2, 1973, three days before the expected commencement of trial in the Hurok case, the Government moved to sever Sheldon Seigel from the trial on the grounds (i) that he was a government informer who had provided information leading to the indictments, (ii) that he had testified before the Grand Jury, and (iii) that he would be called as a Government witness at trial under a grant of immunity. Seigel moved for a protective order preventing the Government from interrogating him based on information obtained from illegal electronic surveillance. Pursuant to 18 U.S.C. § 3504(a)(1), the Government acknowledged the existence of illegal F.B.I. wiretaps involving Seigel. On April 25, 1973, after having conducted a taint hearing to determine the validity of Seigel's claims, Judge Bauman denied Seigel's motion for a protective order.

bombing. In defiance of Judge Bauman's order that he answer, Seigel refused and was again held in civil contempt.

Appellant Richard Huss was then recalled as the next Government witness at the trial (App. 194).* In response to questions put to him, Huss stated his name and address but refused to answer further questions on the ground that "my testimony might tend to incriminate me . . . [and] it is my understanding of the Jewish law that I am prohibited from testifying against another Jew in a non-Jewish Tribunal . . ." (App. 195). Upon Government's application, Huss was granted immunity under 18 U.S.C. § 6002 *et seq.* (App. 194-195). Judge Bauman then explained use immunity to Huss and also advised him that his claimed religious privilege did not constitute a legally justifiable ground upon which he could refuse to answer questions (App. 196-197). Despite Judge Bauman's admonition and specific orders to answer the questions put to him, Huss persisted in his refusal to answer and was held in civil contempt and remanded (App. 197-202).

The Government then called appellant Jeffrey Smilow to the stand.** Apart from stating his age, Smilow refused to answer any of the questions put to him on the grounds of: (i) religious privilege; (ii) double jeopardy; and (iii) unlawful electronic surveillance (App. 203-204). Smilow was thereupon granted immunity under 18 U.S.C. § 6002

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* Page references preceded by "App." refer to Huss' and Smilow's appendix on appeal.

** Smilow had earlier been a party to protracted litigation arising from his refusal to answer questions before the Grand Jury regarding the Hurok firebombing. *Smilow* v. *United States*, 465 F.2d 802 (2d Cir.), *vacated*, 409 U.S. 944 (1972), *on remand*, 472 F.2d 1193 (2d Cir. 1973). On November 27, 1972 Smilow had pleaded guilty to a charge of arson which arose from the January 26, 1972 Columbia Artists Management firebombing (App. 21).

et seq., and Judge Bauman warned him that none of the asserted grounds for his refusal to testify was legally justifiable and ordered him to answer (App. 205-207). Smilow nonetheless refused to answer, and Judge Bauman held him in civil contempt and remanded him (App. 207-212).

On June 26, 1973, this Court affirmed the orders of civil contempt against Huss and Smilow. *United States* v. *Huss*, 482 F.2d 38 (2d Cir. 1973).* On June 27, 1973, Huss was recalled to the stand (App. 212). In response to the first question put to him, Huss stated that although he understood the thrust of this Court's decision affirming the orders of civil contempt against him and Smilow, he still declined to answer any questions on the ground of religious privilege (App. 212-213). Judge Bauman then warned Huss that he would direct the United States Attorney's Office to commence criminal contempt proceedings against him unless he obeyed the order directing him to testify (App. 213-214). Huss acknowledged that he understood (App. 219-221).

The same day Smilow was recalled to the stand and stated that he still declined to answer any questions put to him and understood the consequences of his decision (App. 221-223).**

C. The Post-Trial Proceedings.

On July 31, 1974, following their conviction for criminal contempt of court, Huss and Smilow were each sentenced by Judge Griesa to imprisonment for one year.

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* The order adjudging Seigel in contempt was reversed on other grounds.

** Upon the Government's representation that without Huss' and Smilow's testimony the Government could not proceed with its proof against the defendants Cohen and Davis, Counts One, Two and Three of Indictment S-72 Cr. 778 were dismissed by Judge Bauman.

On November 27, 1974 Huss and Smilow's convictions for criminal contempt of Court were affirmed by order of this Court (Mr. Justice Clark and Moore and Timbers, *C.JJ.*). 506 F.2d 1395.

By order dated December 13, 1974, the Court granted appellants' motion

> "to recall the mandate; to stay its reissuance and to continue bail pending a decision on the petition for rehearing now pending and for a period of thirty days thereafter, pending application to the Supreme Court of the United States for a Writ of Certiorari pursuant to the Rules of Appellate Procedure, should the petition for rehearing be denied . . ."

By orders dated December 31, 1974, this Court denied appellants' petition for rehearing and declined their application for rehearing *in banc*.

On January 31, 1975 appellants' counsel moved this Court "for an order directing the filing *nunc pro tunc* of the order of this Court denying the petition for rehearing. . . ." The moving papers filed in support of the motion represented that counsel had neglected to file a petition for a writ of certiorari in timely fashion and that the time within which to do so had expired (Chevigny affidavit, par. 7). By order of February 21, 1975, the Court, with Judge Moore dissenting, denied the motion and ordered that the mandate be reissued forthwith.

Accordingly, Huss and Smilow were directed by the United States Attorney to surrender on March 10, 1975 to commence service of sentence. Upon their application that they be allowed to remain at liberty during the Passover holiday, Judge Griesa adjourned their surrender date until April 4, 1975.

Under date of March 26, 1975 Huss and Smilow moved under Rule 35 of the Federal Rules of Criminal Procedure for an order reducing the one year sentences which Judge Griesa had imposed. On April 1, 1975, after hearing argument, Judge Griesa denied the motion for a reduction of sentence in all respects. This appeal followed.*

ARGUMENT

The sentence imposed by Judge Griesa was proper in all respects.

Huss and Smilow claim on appeal that their sentences of imprisonment for one year for criminal contempt for refusal to testify were excessive because of the District Court's failure to give adequate weight to "mitigating factors", principally their assertion that religious principles foreclosed their testimony. This contention is without merit.

While ordinarily a sentence within statutory limits is not subject to appellate review, *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974), *United States* v. *Driscoll*, 496 F.2d 252 (2d Cir. 1974), *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973), appellate review of sentences imposed for criminal contempt is uniquely broad. The test on appeal in such cases is whether ". . . the sentences imposed were so excessive as to amount to an abuse of discretion" of the District Court. *Green* v. *United States*, 356 U.S. 165, 188 (1958); *see also Brown* v. *United States*, 359 U.S. 41, 52 (1959). For

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* Huss and Smilow also appealed from Judge Griesa's orders denying their motion to direct the Bureau of Prisons to serve them Kosher food while incarcerated. This Court vacated those orders for lack of jurisdiction in the District Court. *United States* v. *Huss*, Dkt. No. 75-1192 (2d Cir., July 25, 1975).

the reasons that follow, we submit that the sentences here were imposed ". . . with the utmost sense of responsibility and discretion", *Green* v. *United States*, *supra*, 356 U.S. at 188, and should not be disturbed.

Huss and Smilow claim that their sentences should have been half as much because their refusal to testify arose from religious principle rather than some less worthy motive. However, it is clear that Judge Griesa gave careful consideration to this aspect of their contempts in imposing sentence and in denying their motion to reduce sentence. Judge Griesa's remarks at the time of sentence established beyond any doubt the care and circumspection with which he considered all the relevant factors in reaching his sentencing determination:

> "The Court: Let me make a short statement. Both the defendant Huss and the defendant Smilow have been convicted after a jury trial on the basis of a jury verdict of the crime of criminal contempt. That crime was committed by both the defendants in June of 1973 before Judge Bauman. The crime was their refusal despite patient warnings by Judge Bauman, despite the clearest possible legal rulings by Judge Bauman, despite the affirmance of those legal rulings by the Court of Appeals in connection with the civil contempt proceedings.
>
> Judge Bauman specifically warned each defendant that his refusal to purge himself of the contempt then and there would subject him to a trial for criminal contempt, and Judge Bauman warned that the penalty would undoubtedly be a prison term of more than six months, and therefore Judge Bauman set in motion the judicial mechanism under which a jury trial was held so that the court would have the power to impose a sentence of more than six months.
>
> The jury trial has been held and the sentencing matter is before me.

Obviously my sentence is not predetermined by what Judge Bauman did or said, but the facts of what went on before Judge Bauman, the conduct of these men, is of course the case on which my sentence must be based.

I stated earlier, and I think it is very important to have in mind, that any sentencing of mine handed down today is not a sentencing for the underlying crime of fire bombing in connection with the events of January, 1972, at the Columbia Artists office and the Sol Hurok office. That was the underlying crime which Judge Bauman was attempting to try and it was the criminal trial in which Mr. Huss and Mr. Smilow were called to testify.

But I must start my consideration with the fact that Judge Bauman was attempting to try not a routine criminal case, if any criminal case could be called routine, but one of aggravated seriousness, involving a terrifying type of crime and the death of a perfectly innocent young woman.

So it was of great importance for the government to prosecute that crime, to attempt to bring those responsible to justice, and that's what the government was attempting to do, and the court was attempting to try that case, a very important matter indeed.

Mr. Huss and Mr. Smilow each were granted immunity from prosecution of any personal responsibility they may have had in connection with those events, and following the grant of immunity it was their duty to testify and assist the court and the jury to find out the truth about what went on in connection with those serious matters of January, 1972.

Mr. Huss and Mr. Smilow were called upon to tell the truth in order to assist the carrying out of the administration of justice in this country, relating to a very serious problem and crime. They

refused to do so and therefore committed a crime themselves, as the jury has found.

The religious grounds which they asserted for their refusal and other grounds they also asserted, those matters have been discussed with great thoroughness by Judge Bauman, by the Court of Appeals, and the legal rulings have been conclusively laid down that those grounds were not valid grounds for refusing to do their duty as citizens and to tell the truth in this court of law.

I have received a great number of letters from people who are anxious to assist Mr. Huss and Mr. Smilow and to urge that they be treated with leniency at the time of this sentence. Many of those letters urge strenuously that these men had a right on religious grounds to refuse to testify. I mean no disrespect to the authors of those letters, but frankly I am surprised about the misconception which they seem to display. I canot imagine in this country any valid religious grounds for refusing to testify against someone indicted for a crime, whether it is asserted by a person of the Jewish faith or a person of the Catholic faith or Protestant or whatever. That kind of thing simply cannot be permitted if we are to protect our citizens against serious crimes.

I have discussed with Mr. Chevigny the question of whether the provisions of the Federal Youth Corrections Act should be applied. 18 U.S.C., Section 5006 defines a youthful offender as a person under the age of 22 years at the time of conviction. Mr. Smilow is now 19. Mr. Huss is now 18. So application of that statute must be considered. Mr. Chevigny on behalf of these defendants asks for it to be considered.

However, upon consideration I find that treatment or probation under that statute is not appropriate.

Specifically I find, with regard to 18 U.S.C., 5010 (a), that both Mr. Huss and Mr. Smilow require commitment and I find that it would be inappropriate to suspend the imposition or execution of sentence and place either of these men on probation.

With respect to Sections 5010(b) and 5010(c), providing for treatment and supervision in lieu of imprisonment, I specifically find that because of the nature of the offense neither Mr. Huss nor Mr. Smilow would derive benefit from the treatment contemplated under these provisions, nor would such treatment be appropriate.

The materials which have been submitted to me do not indicate that there is any real necessity for rehabilitation as far as the events with which we are involved here. Undoubtedly this is a unique situation. I have no reason whatever to believe that either of these young men will be involved in this type of problem again. It is obviously unique and not subject to repetition.

It seems to me that the purpose of sentence and punishment in this case is to enforce the law, to vindicate the power of the court, to require citizens to perform this important duty of testifying. That is the beginning and the end of the purpose of sentence and punishment in this case, and those purposes are not, in my view, served by the application of the treatment and supervision provisions of the Federal Youth Corrections Act.

Let me say one other thing as a prelude. I repeat that the sentence should not be viewed by me or anybody else as being imposed for the underlying crime. This sentence cannot be viewed by a means of punishment for that crime. This sentence is imposed solely for the criminal contempt committed.

Under all the circumstances, I believe that the following sentences should be imposed and I hereby impose them:

> The defendant Huss is sentenced to a term of imprisonment for one year and the defendant Smilow will be sentenced to a term of imprisonment of one year" (App. 315-320).

Similarly, in passing on the motion to reduce sentence eight months later, Judge Griesa carefully considered all of the factors relevant to the sentences previously imposed, including the assertions of religious privilege:

> ". . . The sentence as originally handed down was carefully considered on the basis of all the circumstances, including the matters now reviewed before me, and the reasons why I imposed one year imprisonment still stand, and I find nothing at all in the present submission which in any way indicates that the sentence should be reduced to any degree.
>
> There is, of course, new information about the defendants presented now as far as their current activities are concerned, but all of those matters were basically considered at the time, that is, the facts about their academic careers and so forth, and the updating of the materials as far as their personal careers provide.
>
> There is no basis for a change of the basic considerations that went into the original sentence.
>
> I want to make it absolutely clear, and I don't want any confusion to be introduced into the record by Mr. Lewin or in any other way concerning my sentence at the time it was made, and my ruling now is not based upon the events which are spoken of by Mr. Lewin as the underlying events or underlying bombing crimes et cetera. I am not now ruling, and I did not then sentence these defendants for such crimes. That really goes without saying. Any sentence based on the types of crimes allegedly committed would be far more than a year, I am quite certain.

The year's sentence relates to the exact crime of which these defendants were convicted, that is, criminal contempt. However, Mr. Gold is quite right that the Court must consider the nature of the prosecution which these defendants frustrated and prevented or helped to prevent, and that prosecution was of a very serious nature. It should have gone forward for the protection of society and for the enforcement of the law, and the prevention of that prosecution is a most serious matter and deserves a one-year sentence, to say the least.

And so I considered the nature of that prosecution which was not prosecuted. Whether that prosecution would have succeeded or not I don't know, but at least the Government should have been allowed to go forward with that law enforcement proceeding.

Now, as far as the culpability and the state of mind, before there was any criminal contempt proceeding brought, the matter had been to the Court of Appeals, and the Court of Appeals had made it perfectly clear that there was no valid ground, religious or otherwise, on which these defendants could refuse to testify. That decision came down. These defendants were apprised of it. They acted in total defiance of that decision. They are citizens of this country, and they acted defiantly and deliberately, in violation of their duties, known duties as citizens.

Now, what distresses me in this picture, among other things, is that there is almost a massive attempt to somehow shield these defendants from any recognition of their guilt. At the time of the sentence, I received a veritable campaign of mail about them, urging leniency. I received dozens of letters bearing exactly the same language and, in many cases, on exactly the same form.

In connection with this motion, I am receiving, though nothing like the volume I received—many letters containing the identical language.

I don't assume—and that is of no great moment to me—if criminal defendants and their families and their friends want to have mail sent to the Court and letters, they can be on form letters or any other way. It is perfectly okay. But here the sad fact to me is that this massive support, this tremendous amount of mail refusing to acknowledge the guilt of these defendants, to me represents a failure on the part of these people to acknowledge the laws of our country and to acknowledge the responsibility of these defendants and to acknowledge their guilt.

These defendants will have to live their lives. The best thing their families and friends and lawyers could do for them, the very best thing they could do for them, as in the case of anybody else who has done the wrong thing, is to make them face up to it. It is a cruel deception to hide from them or attempt to hide from them the fact of guilt. That is a disservice to them. I for one won't participate in that, and if their families and friends really are thinking of their welfare, they will help them see what they have done wrong.

The campaign that has gone on to me is a distressing thing. It is a distressing thing for them. It is a distressing thing for our community, and I am utterly convinced that the motion for reduction of sentence has absolutely no merit, and it is denied" (App. 380-384).

The views expressed by the trial court concerning the religious basis asserted for Huss' and Smilow's refusal to testify are entirely consistent with those expressed by the Judges of this Court who had passed on such claims in

Smilow v. *United States*, *supra*, and *United States* v. *Huss*, *supra*. The underlying basis for Huss' and Smilow's claim here seems to be that insufficient weight was given at sentence to the "goodness" of their motives in refusing to testify. However, they point to nothing in the record that suggests that Judge Griesa did not give due regard as a mitigating factor on sentence to the fact that their refusal to testify sprang from religious, rather than baser, motives.* Nor do they suggest what weight as a mitigating factor a refusal to testify on such a basis might have, except insofar as they rely on *United States* v. *Levine*, 288 F.2d 272, 275 (2d Cir. 1961), which involved a sentence of a year's imprisonment for a refusal to testify arising from Levine's quite different ". . . fear of ganster reprisals against his wife and children"; the Court in *Levine* also reduced the sentence because of its finding that the sentence was in part coercive and that its utility for such a purpose had passed, a factor clearly missing here. *Levine*, accordingly, hardly seems apposite to this case. Moreover, the weight to be attached to a single factor in mitigation of punishment appears to be uniquely a question for the discretion of the District Court.

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* We note parenthetically that there has never been a finding of any sort that religion was the true reason for the refusal of Huss and Smilow to testify. Indeed, when Smilow's religious claims were first before this Court, the Court suggested, as to the claim that Jewish law forbade his giving testimony before the Grand Jury, that ". . . its precise religious basis is not clear from the record before us". *Smilow* v. *United States*, *supra*, 465 F.2d at 804. Similarly, when the contempts were committed by Huss and Smilow at the Hurok trial, both asserted, among others, claims that to testify would violate Jewish law, but the applicable principles of that law, insofar as explained at the time, were set out quite differently on behalf of each. The dogmatic orthodoxy and sincerity of the assertions of religious privilege are not conclusive or even particularly significant to the issue before the Court now, however, for reasons to be discussed *infra*.

Of principal importance to the question of sentence, however, is the aggravated nature of the offense that Huss and Smilow claim that their religious beliefs mitigate. First, unlike most witnesses who claim a lawful basis for a refusal to testify, neither Huss nor Smilow was put "to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). The claim that Jewish law might provide a proper basis to refuse to testify had been long since disposed of during Smilow's attempt, ultimately successful for other reasons, to avoid testifying before the Grand Jury. *Smilow* v. *United States, supra.* Similarly, to the extent that religious grounds, and others, were used to excuse a refusal to testify at the subsequent Hurok trial, Huss and Smilow received appellate review of their claims in the midst of that trial, *United States* v. *Huss, supra,* 482 F.2d at 51-52, were accorded a new opportunity to testify after this Court's decision, and persisted in their refusals to testify. The criminal contempt charged, as Huss and Smilow were at pains to emphasize in their brief on appeal after conviction for that crime (at page 28), embraced their refusal to testify at the Hurok trial both before and after this Court ruled in *Huss.*

In addition, both Huss and Smilow were given ample warning that their continued refusal to testify would result in the kind of proceedings and penalties of which they now complain, as the following excerpts from the Hurok trial indicate. When Huss refused to testify at the Hurok trial for the first time on June 8, 1973, Judge Bauman warned him as follows:

> The Court: "Before you say anything, I will hear you, of course, Mr. Huss. I find you in contempt of this court. There are two kinds of con-

tempt that I want to tell you about. One is civil contempt which provides for your incarceration during the course of this proceeding but leaves the keys to the prison with you in that if you decide to answer at any time, you will be released.

The second kind of contempt is a criminal contempt which does not look for answer but is meant as punishment for your contemptuous conduct in refusing to answer questions. I instruct you, sir that a civil contempt does not exclude criminal contempt. I find the witness in contempt of court" (App. 201-202).

When Smilow refused to testify on June 8, the Court again repeated a similar warning:

"The Court: Mr. Smilow, I want to explain something to you: I am about to hold you in civil contempt. That means that I am going to order that you be placed in the custody of the Attorney General for the duration of the trial unless in the interim, in the meanwhile you indicate your willingness to answer the questions you have declined to answer today. Do you understand?

* * * * *

That is civil contempt and the purpose of civil contempt is to induce to break your silence. There is another kind of contempt which is called criminal contempt which has as its purpose punishment for the crime of contempt. The two aren't exclusive. Do you understand what I have just told you?

"The Witness: Yes.

The Court: All right, Mr. Smilow. The court finds you in civil contempt and it is the order of the court that you be committed to the custody of the Attorney General for the duration of the trial or until such time as you answer the questions which you have declined to answer today" (App. 211-212).

Thereafter, on June 27, having received adverse review by this Court of the legitimacy of their refusals to testify Huss and Smilow persisted in their contemptuous conduct at the resumed Hurok trial despite unmistakable warnings from Judge Bauman:

> "The Court: Before this goes any further, Mr. Huss, I want to tell you something: I explained the last time that your failure to answer questions when I have ordered you to answer constituted contempt of court. I told you that my having committed you for civil contempt does not preclude the bringing of charges of criminal contempt against you. I again want to advise you of that and I want to make other things abundantly clear to you, Mr. Huss: One. I am going to ask the United States Attorney to comply with the provisions of Rule 42(b) and proceed against you for criminal contempt if you persist in your refusal to answer. I, for one, regard your refusal to answer as criminal contempt. I want further to advise you, Mr. Huss, that for criminal contempt there is no limit upon the amount of punishment which can be imposed upon you for that crime. Is that clear?
>
> The Witness: Yes, your Honor.
>
> Question by Mr. Jaffe.
>
> Q. Mr. Huss, do you know an individual named Cohen? A. Same declination.
>
> Mr. Jaffe: Would your Honor direct the witness.
>
> The Court: I order you to answer.
>
> The Witness: Same declination."
>
> Question by Mr. Jaffe.
>
> Q. Do you know an individual named Murray Elbogen? A. Same declination.

The Court: I order you to answer.

A. Same declination.

Q. Do you know an individual named Jeffrey Smilow? A. Same declination.

The Court: I order you to answer.

A. Same declination.

Q. Do you know an individual named Sheldon Seigel? A. Same declination.

The Court: I order you to answer.

A. Same declination.

Q. Do you know an individual named Jerry Zellerkraut?

Mr. Zweibon: Your Honor, I think we have gone——

The Court: I don't think so. Go ahead.

Q. Do you know an individual named Jerome Zellerkraut? A. Same declination.

The Court: I order you to answer.

A. Same declination.

Q. Directing your attention to the 26th of January, 1972, did you see Sheldon Davis, Stuart Cohen, Murray Elbogen, Jeffrey Smilow, Sheldon Seigel or Jerome Zellerkraut? A. Same declination.

The Court: I want to again advise you that your refusal to answer these questions over my order constitutes in my view criminal contempt of court and I want you to have that in mind. I now order you to answer.

The Witness: Same declination.

Q. Directing your attention, Mr. Huss, to the morning of January 26, 1972, would you tell the court who you that is, what persons you saw on that morning? A. Same declination.

The Court: I order you to answer.

The Witness: Same declination.

Mr. Miller: Excuse me, your Honor. The witness has made it clear in my mind that he will not answer. I see no purpose in this continuing.

The Court: Let me tell you what the purpose is: someone has committed a dastardly, vicious, unforgivable, unforgettable crime. Someone is frustrating the administration of justice in a case that in my mind involves murder. People who deliberately do so will learn the power of the law even if there are those who have literally gotten away with murder. Proceed."

Question by Mr. Jaffe.

Q. Mr. Huss, on the morning of January 26, 1972 did you go in a motor vehicle with Sheldon Davis, with Jeffrey Smilow and Murray Elbogen and with Jerome Zellerkraut and drive in an automobile from Brooklyn to Manhattan? A. Same declination.

The Court: I order you to answer.

The Witness: Same declination.

Q. Had you, prior to the morning of January 26, 1972, agreed with Sheldon Davis and Stuart Cohen that you and Jerome Zellerkraut would go to the offices of Sol Hurok? A. Same declination.

Mr. Slotnick: I object to the form of the question.

The Court: Overruled. Same order. I order you to answer.

The Witness: Same declination.

Q. Mr. Huss, did you, on the morning of January 26, deliver any attache case along with Jerome Zellerkraut to the offices of Sol Hurok? A. Same declination.

The Court: I order you to answer.

The Witness: Same declination.

The Court: I again advise you that your continued refusal to answer these questions over my direction constitutes criminal contempt of court. Go ahead.

Q. Mr. Huss, prior to the morning of January 26, 1972, or on the morning of January 26, 1972, did you have any discussions with Sheldon Davis, Stuart Cohen, Sheldon Seigal, Jerome Zellerkraut, Murray Elbogen, or Jeffrey Smilow about carrying an attache case to the offices of Hurok Concerts Incorporated? (App. 213-217).

Huss continued to refuse to answer. Finally, Judge Bauman said:

"The Court: I want to tell you, Mr. Huss, as I have throughout your examination this morning, that failure to answer the questions put to you constitutes in my judgment criminal contempt. However, so far as the United States Attorney is concerned, because of the seriousness of this criminal contempt, I think that the United States Attorney should proceed on papers as indicated by Rule 42 (b), namely, that part 'or on application of the United States Attorney by an order to show cause or an order of arrest.'

You have made the application and since you made the application, I ask you to comply with Rule 42(b) and proceed by order to show cause or an order of arrest so that the order to show cause, to be perfectly frank with you will specify in writing for this man what he is facing. Obviously this proceeding will be a jury proceeding.

Mr. Jaffe: That's correct.

The Court: Because it is inconceivable to me that anybody would be thinking of proceeding in a manner that would limit punishment if this man is guilty to six months, and therefore I want every letter observed. I want him proceeded against in writing, I want the case to proceed to a jury trial, and I want the judge, whoever he is, to have in mind my views as I have expressed it and previously this morning of the seriousness with which I view the frustration of a murder prosecution. People may do that but the law will make them pay" (App. 220-221).

The appearance of Smilow on June 27 was similar:

"The Court: Let me ask you, Mr. Smilow, are you prepared to answer the questions which you refused to answer at the last session?

The Witness: No. I decline to do so.

The Court: I am not even going to ask him anything today other than the fact that he would persist in his refusals to answer. Beyond that I think the record is sufficient to proceed against him as I warned him the last time for criminal contempt and the United States Attorney advises me that he is going to do it based on the record the last time at which you made no such request. Then, if you want to take it up with the trial judge, who-

ever he may be, in his criminal contempt case, that may be the place to do it, but for now I believe, and I advise you, sir, that your failure to answer questions which you are now looking at, at the last session which you were called upon to testify constitutes criminal contempt of court and that the punishment for criminal contempt is without limit, is that clear?

The Witness: Yes.

Mr. Leighton: Is your Honor going to allow the United States Government to ask of Mr. Smilow questions concerning this record?

The Court: No. The record is clear.

Mr. Putzel: I think the record is perfectly clear and I think Mr. Smilow has answered that he persists in his contemptuous refusal to answer questions and accordingly, pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure, we will move this court through an order to show cause on papers to have Mr. Smilow cited for criminal contempt. I would ask the court to inquire of Mr. Smilow whether he was in court just previous to this during the time when Mr. Huss was advised by the court of the consequences of his refusal to testify.

"The Court: Were you here when I dealt with Mr. Huss a few moments ago? Were you in the courtroom?

The Witness: Yes.

The Court: You heard the entire——

The Witness: Yes.

The Court: Such as all the questions and everything I said to Mr. Huss?

The Witness: Yes.

The Court: All right" (App. 221-223).

Perhaps most significantly, as the quoted excerpts illustrate, in addition to being a contempt of the most aggravated sort, Huss' and Smilow's refusals to answer frustrated a prosecution of the most serious kind—the explosion of two firebombs at different locations on the same day, resulting in the death of a young woman, injuries to others, and the destruction of property. These offenses were characterized by this Court in *United States* v. *Huss, supra,* 482 F.2d at 39, 52, as "diabolical" and "senseless and cowardly acts of violence". The portion of the indictment which was being tried at the Hurok trial had to be dismissed because Huss and Smilow would not testify, and the severed counts are being dismissed by *nolle prosequi.*

Under all these circumstances, and accepting the sincerity of Huss' and Smilow's religious grounds for refusing to testify, it is difficult to understand how this single factor could be said to be entitled to further weight than has been accorded or how the sentences imposed could be said to have been excessive.

Huss and Smilow seek to buttress their argument by making the entirely erroneous and misleading contention that they have received ". . . the most severe criminal contempt sentences for refusal to testify that appears in the reported decisions for federal courts over the past two decades" (Brief at 5). No authority is cited, though principal reliance for this proposition is apparently placed, later in the brief, on a footnote in Chief Justice Warren's dissenting opinion in *Brown* v. *United States, supra,* 359 U.S. at 58 n. 11 (Brief at 7, 11). While simple comparison of sentences imposed for criminal contempt arising from a refusal to testify lacks much meaning because of significant

differences in the circumstances of the offense and the character of the offender, the Chief Justice's footnote in *Brown* is slender support for the proposition which Huss and Smilow advance. First, in *Brown* itself the Court affirmed a sentence of fifteen months imprisonment for criminal contempt for refusing to tesitfy as ". . . not an abuse of the District Court's discretion". 359 U.S. at 52. Second, the observation in the cited footnote in *Brown* were soon qualified by the Chief Justice, again in dissent, in *Piemonte* v. *United States*, 367 U.S. 556, 561 (1961), in which the Court sustained a conviction and sentence of eighteen months imprisonment for criminal contempt for refusal to testify. Chief Justice Warren, alluding to his earlier remarks in dissent in *Brown*, noted in his dissenting opinion in *Piemonte*, 367 U.S. at 561 n. 1:

> "Only in the last few years has it become the fashion for district judges to use the summary contempt power as a device for imposing long terms of imprisonment. See, *e. g.*, *Reina* v. *United States*, 364 U.S. 507 (two years' imprisonment); *Brown* v. *United States*, 359 U.S. 41 (fifteen months' imprisonment); *Green* v. *United States*, 356 U.S. 165 (three years' imprisonment); *Collins* v. *United States*, 269 F.2d 745 (three years' imprisonment); *Tedesco* v. *United States*, 255 F.2d 35 (two years' imprisonment); *Corona* v. *United States*, 250 F.2d 578 (two years' imprisonment). Prior to this recent trend, the summary contempt power was seldom used to impose more than a nominal fine or a short term of imprisonment. See *Brown* v. *United States*, *supra*, at 58-59 (dissenting opinion)."

Third, in cases besides those cited just above, sentences of imprisonment for a year or more for criminal contempt for refusal to testify have been frequently imposed in the District Courts and sustained in this Court and the Courts of Appeals in other Circuits. *United States* v.

Leyva, 513 F.2d 774 (5th Cir. 1975).* *United States* v. *Sternman*, 433 F.2d 913 (6th Cir. 1970); *United States* v. *Shillitani*, 345 F.2d 290 (2d Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 364 (1966); *United States* v. *Pappadio*, 346 F.2d 5 (2d Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 364 (1966); *United States* v. *Tramunti*, 343 F.2d 548 (2d Cir. 1965), *vacated and remanded on other grounds*, 384 U.S. 886 (1966); *United States* v. *Castaldi*, 338 F.2d 883 (2d Cir. 1964), *vacated and remanded on other grounds*, 384 U.S. 886 (1966); *United States* v. *Harris*, 334 F.2d 460 (2d Cir. 1964), *rev'd on other grounds*, 382 U.S. 162 (1965).** *Cf. Braden* v. *United States*, 365 U.S. 431 (1961), *aff'g.* 272 F.2d 653 (5th Cir. 1959); *United States* v. *Orman*, 207 F.2d 148 (3d Cir. 1953); *United States* v. *Costello*, 198 F.2d 200 (2d Cir.), *cert. denied*, 344 U.S. 874 (1952).

Huss and Smilow make several other erroneous assertions that are briefly disposed of. They claim in Point II of their brief that Judge Griesa improperly took into account their alleged participation in the Columbia Artists and Hurok bombings in imposing sentence. Their exclusive reliance on a passing remark by the Court seven months after sentence was imposed is hardly a sufficient basis on which to conclude that the clear statements to the contrary made by Judge Griesa both at sentence and in denying the motion to reduce sentence did not accurately reflect that sentence was imposed for the contempts without consideration of other criminal activity. Moreover, even if the Judge had taken the participation of Huss and Smilow in the Columbia Artists and Hurok bombings into consideration in imposing sen-

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* In *Leyva*, a sentence of thirty-five years imprisonment imposed by the District Court for refusal to testify at trial was reduced to two years imprisonment by the Court of Appeals.

** See also *United States* v. *Harris*, 367 F.2d 826 (2d Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967).

tence for the criminal contempt, it would not have been a "fundamental" error, as Huss and Smilow sclaim without explanation or citation (Brief at 13), or indeed any kind of error. *United States* v. *Needles*, 472 F.2d 652, 655 (2d Cir. 1973); *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972); *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968); *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965). Huss and Smilow do not claim that they did not participate in the bombings. Smilow indeed has admitted it by pleading guilty in state court to arson for the Columbia Artists bombing (App. 18, 20-21), and the record makes clear, from the grant of immunity to Huss and the questions put to him, the Government's view that Huss, along with Jerome Zellerkraut, planted and ignited the firebomb at the Hurok offices (App. 199-200).

Finally, some response is due the argument that if the sentence is not reduced here, Huss and Smilow will have been "subjected to heavier punishment than any other member of the organization [Jewish Defense League] including its leader and others who were directly implicated (sic) in acts of violence or conduct preparatory to such acts" (Brief at 5). It suffices to say that this situation, if accurately described in appellants' brief, is one substantially of their own making. The reason that others have not been convicted and punished for the serious crimes charged in the Hurok case is precisely because of the criminal conduct of these defendants. Their argument, recognized for what it is, is that since Huss and Smilow have successfully enabled others guilty of more serious offenses to escape punishment, it is not fair that they alone should be punished, and their offense should be excused. No answer to such an argument is necessary, and the wanton response by Huss and Smilow to the seriousness of their offenses, *United States* v. *Hendrix*, 505 F.2d 1233, 1236 (2d Cir. 1974) establishes that Judge Griesa's sentence is

lenient indeed. The urgent necessity in a case of this sort to vindicate the authority of the Court and to make clear to Huss and Smilow and to others that prosecutions for serious offenses cannot be lightly thwarted without justifiable cause requires that Judge Griesa's order be sustained in all respects.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 31st day of July, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Nathan Lewin, Esq.
Miller, Cassidy, Larroca & Lewin
2555 M. Street, N.W.
Washington, D. C. 20037

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III
JOHN D. GORDAN, III

Sworn to before me this

31st day of July, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977